Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ROBERT E. THOMAS,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA, ET AL.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. I. WHETHER A UNITED STATES COURT OF APPEALS ERRONEOUSLY DECIDED A FEDERAL QUESTION THAT PETITIONER DID NOT MAKE A SUBSTANTIAL SHOWING OF THE DENIAL OF A FEDERAL RIGHT, DENYING A STATE PRISONER'S FEDERAL HABEAS CORPUS CLAIM THAT PREVIOUS COUNSEL AND PENNSYLVANIA VIOLATED HIS CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION, BY COMPELLING HIM TO UNDERGO A PSYCHIATRIC EXAMINATION IN DIRECT CONFLICT WITH THE DECISION IN ESTELLE V. SMITH, 451 U.S. 454 (1981)?

II. WHETHER A UNITED STATES COURT OF APPEALS ERRONEOUSLY DECIDED A FEDERAL QUESTION THAT PETITION DID NOT MAKE A SUBSTANTIAL SHOWING OF THE DENIAL OF A FEDERAL RIGHT, DENYING A STATE PRISONER'S FEDERAL HABEAS CORPUS CLAIM WHEN MOVANT'S PREVIOUS COUNSEL VIOLATED THE CONSTITUTIONAL GUARANTEE OF THE EFFECTIVE ASSISTANCE OF COUNSEL, BY FAILING TO PRESENT PSYCHIATRIC DEFENSES TO A HOMICIDE

PROSECUTION, WHICH CONFLICTS WHICH APPLICABLE DECISIONS OF THE SAME AND/OR ANOTHER UNITED STATES COURT OF APPEALS?

PARTIES:

The names of all the parties to the proceeding in the Court whose judgment is sought to be reviewed are as follows:

ROBERT E. THOMAS,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
GREGORY WHITE, SUPERINTENDENT,
ERNEST PREATE, ATTORNEY GENERAL,

Respondents

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I. Table of Authorities

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II. Reported Opinions Below[2]

The Order of Court of the United States Court of Appeals for the Third Circuit C.A. No. 94-3716 dated July 31, 1995, which reads as follows:

> Appellant's request for Certificate of Probable Cause to appeal is denied because Appellant does not make a substantial showing of the denial of a federal right. See Barefoot v. Estelle, 463 U.S. 880, Reh. denied 464 U.S. 874 (1983).

The Order of Court of United States District Court Judge Donald Lee, dated November 21, 1994 is appended.

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[2] United States Supreme Court Rule 14(1)(d).

III. Statement of Jurisdiction[3]

a. The Constitution of the United States of America, Article III, Section 2, which states "the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

b. This Petition is directly derived from the Act of Congress, 28 United States Code § 1257(3).

c. This Petition is directly derived from Supreme Court Rule No. 17(1)(b), which recognizes jurisdiction in the following circumstances:

> When a state court of last resort has decided a federal

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[3] United States Supreme Court Rule 14(1)(e).

question in a way in conflict with the decision of another state court of last resort or a federal court of appeals;

d. This Petition is directly derived from Supreme Court Rule No. 17(1)(c), which recognizes jurisdiction in the following circumstances:

> When a state court or federal court of appeals has decided an important question of federal law, which has not been but should be settled by this court, or has decided a federal question in a way in conflict which applicable provisions of this Court.

IV. Constitutional and Statutory Provisions[4]

The constitutional and statutory provisions at issue are set forth as follows:

A. The Constitution of the United States of America, Article V, reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of

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[4] See also Title 28 U.S.C. § 2241(a) and § 2254(a).

> law; nor shall private property be taken for public use, without just compensation.

B. The Constitution of the United States of America, Article VI, reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

C. The Constitution of the United States of America, Article XIV, reads as follows:

> All persons born or naturalized in the United States, and

subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection laws.

V. Statement of the Case

Petitioner, who is diagnosed as having borderline retardation, residual schizophrenia, dissociative reaction and dyslexia, has been sentenced to a mandatory period of life imprisonment following his conviction of Murder in the First Degree in the state courts of Pennsylvania.

The conviction stems from the death of Petitioner's wife, who died as a result of a single .22 caliber gunshot wound to the head on January 7, 1990. The shooting occurred in the house trailer of Petitioner and the deceased, where they resided since 1985 with their two small children.

During the evening of January 6, 1990, Petitioner and the deceased engaged in sexual relations. Immediately thereafter, the deceased demeaned Petitioner's sex with her, described her paramour as a better lover and then related detailed aspects of

her sexual relationship. The deceased then told Petitioner that she no longer loved him, that she did not want him any longer, that she loved her paramour, that others were aware of the affair, and that the paramour would be a better father to their children. The deceased then went to sleep while Petitioner wept in the living room. Despondent, Petitioner then shot his wife and recorded a suicide message on his son's tape recorder. Telephoning his father-in-law, Petitioner told him that he had shot the deceased and was going to shoot himself.

On May 21, 1990, Petitioner was diagnosed as having borderline retardation, residual schizophrenia, dissociative reaction and dyslexia by a defense expert witness. The expert then testified that Petitioner was unable to formulate a plan or carry out a design to commit murder.

Without consultation, Petitioner's trial counsel consented to the state's

request for psychiatric examination. Without warning Petitioner of his rights against self-incrimination, Petitioner was instructed by counsel to submit to an interview by the state's psychiatrist. The expert did not warn Petitioner of his constitutional rights prior to or during the interviews. The expert witness testified for the state at trial, that Petitioner had mental illness relating to the death of his wife and separation from his children, but was able to appreciate the nature and consequences of his act, was able to control his conduct and knew right from wrong. The expert concluded that Petitioner was in perfect "mental health" and was not insane at the time of the commission of the offense. The insanity defense was rejected by the jury, which found Petitioner guilty of first degree murder.

On June 2, 1994, your movant filed as Petitioner an Application for Writ of

Habeas Corpus pursuant to 28 U.S.C. § 2254. The United States District Court for the Western District of Pennsylvania denied said Petition. An appeal was perfected and Application for Certificate of Probable Cause made to the Third Circuit Court of Appeals at Civil No. 916 of 1994 on or about December 14, 1994. (App. 1a and 3a)

By Order of the Court of Appeals dated July 31, 1995, the Certificate for Probable Cause to Appeal was denied. (App. 18a)

VI. LEGAL ARGUMENT

The Third Circuit Court of Appeals denial of a state prisoner's federal habeas corpus claim on the basis that no substantial showing of the denial of federal right was made, is in direct conflict with the applicable decisions of the United States Supreme Court. Contrast, Milton v. Wainright, 407 U.S. 371 (1972). The Circuit Court of Appeals ruled without an evidentiary hearing after exercising plenary review.[5]

Petitioner alleged that the state failed to warn Petitioner, prior to a psychiatric examination, that he has the right to remain silent and that any statement he makes can be used against him. Trial counsel was also ineffective for failing to warn Petitioner and/or improperly waiving Petitioner's fundamental

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[5] United States Supreme Court Rule 10(1)(a) and (c).

constitutional right against self-incrimination by consenting to the expert's psychiatric examination. This right is guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States of America and Article I, § 9 of the Constitution of Pennsylvania and guarantees all citizens the privilege against self-incrimination.

Once an insanity defense is raised, the accused is free to invoke his constitutional protection concerning the incriminating facts surrounding the incident in question asked by a psychiatrist under federal law. Estelle v. Smith, 451 U.S. 454 (1981). In Estelle, this Court held that a criminal defendant's Fifth Amendment right against compelled self-incrimination is violated where the state fails to warn the defendant, prior to a psychiatric examination, that he has the right to remain silent and that any statement he makes can

be used against him at a capital sentencing proceeding. Also, where a criminal defendant's right to counsel has attached, and a psychiatric's examination occurs during a critical stage of the proceedings against the defendant, the defendant's Sixth Amendment right to assistance of counsel is violated if the state fails to inform counsel prior thereto. Estelle v. Smith, supra.

Petitioner's allegation of Fifth, Sixth and Fourteenth Amendment violations clearly raises the substantive claim that the conviction violated the federal constitution. Estelle v. McGuire, 502 U.S. 62 (1991).[6] Petitioner made a clear showing of the denial of a fundamental right protected by the Fourteenth Amendment in alleging that his counsel was ineffective in protecting his rights guaranteed by the

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[6] Milton v. Wainright, 407 U.S. 371 (1972).

Fifth and Fourteenth Amendment. Cuyler v. Sullivan, 446 U.S. 335 (1980). This claim as well as others clearly raised a constitutional infirmity as required by this Court. Tollette v. Henderson, 411 U.S. 258 (1973). The failure of Petitioner's retained counsel to provide the adequate representation rendered the trial so fundamentally unfair that it violated the Fourth Amendment and requires habeas corpus relief. Cuyler v. Sullivan, supra. The Third Circuit Court of Appeals denied the Certificate of Probable Cause without any legal basis.

Petitioner recognizes that the primary means of denying frivolous appeals is to withhold a certificate of probable cause if there is not a substantial showing of a denial of a federal right. Barefoot v. Estelle, 463 U.S. 880 at 891 (1983). However, before the Court may dismiss a claim as frivolous, it must be confident

that the claim is barred by statutes, applicable decisional authorities, or lacking a factual basis. Barefoot v. Estelle, supra. (28 U.S.C. § 2253).

In the case at bar, the dismissal on the basis of frivolousness is clearly erroneous since Petitioner's claim was based upon a violation of two fundamental constitutional rights both recognized by the Fourteenth Amendment.

Accordingly, the Third Circuit Court of Appeals had no basis to conclude that Petitioner did not make a "substantial showing of the denial of a federal right" relying upon the precedential authority of Barefoot v. Estelle. Additionally, the United States Court of Appeals has decided a federal question which is in direct conflict with the principles espoused by your Honorable Court's decision in Estelle v. Smith, 451 U.S. 445 (1981) to the extent the Court of Appeals found that there was no

assertion of a federal right.

Moreover, the Circuit Court of Appeals' reliance upon Barefoot v. Estelle is clearly misplaced and in direct conflict with other decisions of your Honorable Court since in Barefoot the District Court had denied a Petition for Writ of Habeas Corpus on a request for a stay of execution of a death penalty. Barefoot v. Estelle, supra. at 881 - 883. The lower court granted the certificate of probable cause, unlike in the instant case.

Here, Petitioner contends also that his trial counsel was ineffective with respect to his Fifth and Fourteenth Amendment rights as well as in asserting a defense related to his mental incapacity. Such assertions have clearly identified a federal constitutional issue. Cuyler v. Sullivan, supra. Moreover, your Honorable Court has held that since the ineffective assistance of counsel involves the concept

of fundamental fairness, there is no special standard to be applied to an ineffective assistance of counsel claim. Strickland v. Washington, 466 U.S. 668 (1989).

The Circuit Court of Appeals also decided that there was no claim of a substantial federal right in direct conflict with other applicable decisions of the same court of appeals and other circuits. The Third Circuit Court of Appeals has previously held that a substantial claim of a violation of federal right is made by state prisoners when they allege a violations of their Sixth Amendment right to the effective assistance of counsel in homicide prosecutions. Frey v Fulcomer, 974 F.2d 348 (3rd Cir. 1992), Zettlemoyer v. Fulcomer, 923 F.2d 284 (3rd. Cir. 1991).[7] Although in both cases the court of appeal declined to reverse the conviction, the

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[7] Diminished Capacity is also recognized under the Federal Sentencing Guidelines, U.S.S.G. §5 k 2.13.

court engaged in a plenary review of the allegations. In Frey, the court even held that the accused had been denied effective representation in the penalty phase, although not raising to the level requiring reversal of the conviction. Frey v Fulcomer, supra.

In Zettlemoyer, the court reached the merits of the issue that counsel's failure to present psychiatric defense, constituted ineffective stewardship at trial. Zettlemoyer v. Fulcomer, supra.

In the case at bar, the court of appeals never reached the issue of trial counsel's failure to investigate, develop, or introduce any evidence or request a jury instruction on the defense of "diminished capacity", seeking to reduce the crime of Murder in the First Degree to Third Degree Murder. Under both state and federal law, it is well-settled that such evidence can be offered to negate the specific intent to

kill. Zettlemoyer v. Fulcomer, supra.[8] Commonwealth v. Walzack, 468 Pa. 210, 368 A.2d 914 (1976); Commonwealth v. Weinstein, 499 Pa. 106, 451 A.2d 1344 (1982); Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982); Commonwealth v. Sourbeer, 492 Pa. 17, 422 A.2d 116 (1980).

The court of appeals failed to consider counsel's neglect to offer psychiatric evidence that Petitioner acted in the heat of passion based upon the provocation from the deceased extra-marital, inter-racial affair. Counsel never presented overwhelming psychiatric evidence which was admissible in reducing murder to manslaughter. Commonwealth v. McCusker, 448 Pa. 382, 292 A.2d 286 (1972); Commonwealth v. Light, 458 Pa. 328, 326 A.2d 288 (1974).

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[8] Diminished Capacity is also recognized under the Federal Sentencing Guidelines, U.S.S.G. §5 k 2.13.

VII. Conclusion.

In conclusion, Petitioner requests your Honorable Court to remand the matter to the Third Circuit Court of Appeals or alternatively, to the United States District Court for the Western District of Pennsylvania and to ultimately vacate the Order of the Supreme Court of Pennsylvania which has affirmed the judgment of sentence.

Respectfully submitted,

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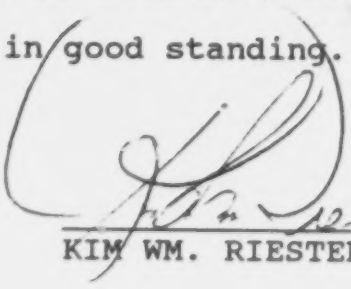
* Counsel Of Record

CERTIFICATE OF MEMBERSHIP IN BAR

I, KIM WM. RIESTER, Esquire hereby certify that I was duly admitted and qualified as an attorney and counselor of the Supreme Court of United States on the 2nd day of December, 1988 and remain as a member in good standing.



KIM WM. RIESTER, ESQUIRE

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT EDWARD THOMAS,	)	
	)	
Petitioner,	)	
	)	Civil Action
v.	)	No. 94-0916
	)	
COMMONWEALTH OF PENNSYLVANIA,	)	
	)	
	)	
Respondent	)	

ORDER OF COURT

AND NOW, this 21st day of November 21, 1994, after a petition for writ of habeas corpus was filed by Robert E. Thomas, and after the Report and Recommendation of the Chief United States Magistrate Judge was filed, and the parties were granted ten days after being served with a copy to file written objections thereto, and upon consideration of the "objections, exceptions to findings and recommendation and/or motion for reconsideration, modification, and/or vacation of the Report and Recommendation", filed by petitioner and treated as

objections, upon consideration of petitioner's request for oral argument on his objections, and upon independent review of the petition and the record, from which it appears that the petitioner's allegations are without merit, and upon consideration of the Report and Recommendation of the Chief Magistrate Judge which is adopted and incorporated as the Opinion of this Court,

IT IS ORDERED that petitioner's request for oral argument on his objections is DENIED, and

IT IS FURTHER ORDERED that the petition of Robert E. Thomas for a writ of habeas corpus is DISMISSED, and that a certificate of probable cause is DENIED.

Donald J. Lee
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT EDWARD THOMAS,	)	
	)	
Petitioner,	)	
	)	Civil Action
v.	)	No. 94-0916
	)	
COMMONWEALTH OF PENNSYLVANIA,	)	
	)	
	)	
Respondent	)	

Report and Recommendation

Recommendation:

It is respectfully recommended that the petition of Robert E. Thomas for a writ of habeas corpus be dismissed, and that a certificate of probable cause be denied.

Report:

Robert E. Thomas by his counsel has presented a petition for a writ of habeas corpus. In a Rule and Order entered on June 3, 1994, the respondents and the District Attorney of Fayette County were directed to answer and show cause, if any, why the relief sought should not be granted.

Thomas is presently incarcerated at the

State Correctional Institution at Pittsburgh serving a life year sentence imposed following his conviction, by a jury, of first degree murder at No. 138 of 1990 in the Court of Common Pleas of Fayette County, Pennsylvania. This sentence was imposed on July 2, 1991.

An appeal was taken to the Superior Court in which the issues presented were:

> I. Appellant's constitutional right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the Constitution of the United States of America as well as Article I, § 10 of the Constitution of the Commonwealth of Pennsylvania were violated by the failure of former counsel to take the following actions:
>
> A. Pretrial
>
> 1. File an omnibus pretrial motion, and offer expert testimony in support of a motion to suppress testimonial evidence.
>
> 2. Warn appellant and then waived appellant's fundamental constitutional right against self-incrimination.
>
> B. Defense at trial:
>
> 1. Effectively introduce expert testimony relating to the defense

of insanity, the verdict of guilty but mentally ill and offer any expert testimony of diminished capacity and the state of mind relating to voluntary manslaughter.

2. Raise the legal issue of diminished capacity.

3. Give an adequate argument and object to the prosecution's argument.

4. File a motion in limine, make objections and/or request for cautionary instruction to exclude evidence of prior uncharged criminal misconduct.

5. Call defense witnesses.

C. Close of testimony and post trial:

1. Request jury instructions or to object to the charge of the court.

2. File specific and adequate post-verdict motions.

II. Appellant was denied a fair trial as guaranteed by the due process clause of the Constitution of the United States of America and Article I, § 8 of the Constitution of the Commonwealth of Pennsylvania.

On July 26, 1993, the judgment of sentence was affirmed.

A petition for allowance of appeal to

the Pennsylvania Supreme Court was filed in which the issues presented were:

A. Whether a panel of the Superior Court erroneously rejected the assertion that petitioner's trial counsel improperly waived petitioner's constitutional right against self-incrimination by compelling petitioner to undergo a psychiatric examination by the Commonwealth's expert witness?

B. Whether petitioner was denied the effective assistance of trial and post-trial counsel in failing to file a motion to suppress evidence despite a confession which was rendered involuntary due to this mental disability?

C. Whether petitioner's constitutional right to the effective assistance of counsel was violated by the failure of former trial and post-trial counsel in presenting an insanity defense in a homicide trial to the exclusion of defenses of guilty but mentally ill, diminished capacity, and the "heat of passion", reducing the degree of homicide to voluntary manslaughter?

D. Whether petitioner was denied due process and a fair trial when his previous counsel failed to insure that evidence of prior misconduct was deemed inadmissible and did not request an appropriate cautionary instruction?

E. Whether remand is necessary to afford appellate counsel the opportunity to introduce sufficient facts in support of the ineffective assistance of counsel, which were raised for the first time on appeal?

On March 22, 1994, leave to appeal was denied.

In support of the instant petition, Thomas alleges he is entitled to relief on the following grounds:

> Appellant's constitutional right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution of America were violated by the failure of former counsel to file an Omnibus pretrial motion, offer expert testimony in support of a motion to suppress testimonial evidence. Counsel failed to warn appellant then waived appellant's fundamental constitutional right against self-incrimination when counsel consented to a psychiatric interviews by the Commonwealth's psychiatrist.
>
> At trial counsel failed to effectively introduce expert testimony relating to the defense of insanity, the verdict of guilty but mentally ill and offer no expert testimony about diminished capacity or the "heat of passion" which would reduce murder to manslaughter. Counsel also failed to raise the legal issue of diminished

> capacity, adequately give arguments, file a motion in limine, make objections and/or request for cautionary instruction to exclude evidence of prior uncharged criminal misconduct along with failing to call defense witnesses. After the close of testimony and post trial, counsel failed to request jury instructions, object to the charge of the court and file specific and adequate post-verdict motions.
>
> Appellant was denied a fair trial because the lower court erred in allowing the introduction of prior uncharged criminal misconduct without cautionary instructions and other errors at trial.

It is provided in 28 U.S.C. § 2254(b) that:

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

This statute represents a codification of the well-established concept which requires that before a federal court will review any allegations raised by a state prisoner, those allegations must first be presented to that state's highest court for

consideration. Preiser v. Rodriquez, 411 U.S. 475 91973); Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973); Toulson v. Beyer, 987 F.2d 984 (3d. Cir. 1993).

It is only when a petitioner has demonstrated that the available corrective process would be ineffective or futile that the exhaustion requirement will not be imposed. Preiser v. Rodriquez, supra; Toulson v. Beyer, supra.

Because it would appear that the petitioner has presented the issues which he seeks to raise here to the appellate courts of Pennsylvania for their consideration in the first instance, his petition is properly before this Court.[1]

The facts of this case, as noted by the

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[1] We note that in its answer the Commonwealth appears to argue that one claim regarding the ineffectiveness of post-trial counsel was not litigated in the Court of Common Pleas but concedes that this issue was addressed by the Superior Court.

Superior Court are that:

> Thomas and the victim were married in 1980. Since 1985, Thomas, his wife, and their two children resided in a house trailer on the property of Clarence E. Holt, Sr., Joyce's [the victim's] father. The trailer was located approximately 150 yards from Holt's house.
>
> Sometime during the afternoon of January 6, 1990, Thomas confronted his wife. Some days she was late returning from work on the overnight shift at Laurel Health Center. On other occasions, she would tell her husband that she was sleeping at work, but she was not there when Thomas would call during the day. She had also rejected sexual intimacy for the previous three months.
>
> On this afternoon, the victim told Thomas that she was in love and having an affair with a co-worker. Later that evening, after Thomas and the victim had sexual intercourse, she told Thomas that she didn't love him anymore, and that her paramour was a better lover.
>
> Thomas went to the living room and cried, while his wife went to sleep. Sometime around 12:30 a.m., January 7, 1990, Thomas telephoned his wife's lover at work, but he refused to tell Thomas anything.
>
> Thomas then became despondent. He loaded a .22 caliber rifle he kept in the bedroom. Thomas shot his wife in the right side of her face at close range, killing her.

Thomas then called the victim's father and the State Police were summoned. When the police arrived they took the petitioner into custody, and explained his Miranda rights. Thomas signed a waiver of those rights and detailed the events which resulted in the shooting.

At trial Thomas pled insanity, and called two character witnesses and an expert in forensic psychiatry who testified that Thomas suffered from residual schizophrenia and that he did not have the ability to understand what he was doing.[2]

Ineffective assistance of counsel.

In order to prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness, and that as a result prejudice occurred. Deputy v. Taylor, 19 F.3d 1485 (3rd Cir. 1994).

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[2] See: Opinion of the Superior Court.

Prejudice in this context means that there is a reasonable probability that but for the allegedly defective representation, it is reasonably probable that a different result would have occurred. Deputy v. Taylor, supra. Additionally, in reviewing such an allegation, a court must be deferential to the tactical decisions of counsel. Deputy v. Taylor, supra.

In this regard, petitioner makes numerous allegations that counsel was ineffective in many respects. These allegations are best summarized by his counsel:

> Petitioner did not receive due process of law or a fair trial guaranteed by the Fifth Amendment of the Constitution of the United States because of various basic and fundamental trial errors by trial counsel both before and during trial. Petitioner's constitutional right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution of America as well as Article I, § 10 of the Pennsylvania Constitution were violated by the failure of counsel to file a motion to suppress petitioner's confession

support by expert, psychiatric testimony. Thereafter, despite petitioner's borderline retardation, counsel failed to warn petitioner of his fundamental constitutional right against self-incrimination when counsel consented to an interview by the Commonwealth's psychiatrists. Petitioner's trial and post trial counsel improperly waived petitioner's constitutional right against self incrimination guaranteed by the Fifth Amendment of the Constitution of the United States of America by compelling petitioner to undergo a psychiatric examination by the Commonwealth's expert witness and failed to object to the failure of the state to warn petitioner of his rights against self-crimination. Counsel then waived petitioner's constitutional right by directing petitioner to submit to an interview, without any showing that petitioner knowingly and voluntarily waived his rights before incrimination himself. Post-trial counsel was equally ineffective in failing to raise the issues for review on direct appeal. Trial counsel then introduced expert testimony at trial relating only to the defense of insanity. Inexplicably counsel, without reason, failed to introduce any expert testimony in support of the defenses of guilty but mentally ill, diminished or reduced capacity or the "heat of passion" which would reduce murder to manslaughter under decisional authorities of the Commonwealth of Pennsylvania. The fundamental defenses are similarly recognized under the decisional authorities and laws of the United States of America. Petitioner's trial and post-trial

> counsel failed to preserve this obvious issue as well.
>
> Trial counsel also failed to make proper objections to or request cautionary instructions to exclude evidence of prior uncharged criminal misconduct. After the close of testimony, counsel failed to request jury instructions or object to the charge of the court. Post-trial counsel then failed to preserve the issue pertaining to the failure to request cautionary instructions or object to the charge of the court.

Although the petitioner raises numerous claims, they must be examined here solely in the context of ineffective assistance of counsel and not as trial errors.

At a hearing held on the issue of the ineffective assistance of counsel,[3] trial counsel responded to these allegations, and testified that he was aware of the many points raised by the petitioner; that he had considered these matters and that as a matter of strategic planning had decided to pursue the course which he followed. This

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[3] See: Transcript appended to the answer of the Commonwealth.

tact as mainly pursued because counsel believed that there was no basis for suppressing the petitioner's confession to the police and because counsel believed that permitting the petitioner to be examined by a prosecution psychiatrist would bolster his own defense. We recognize that the courts must give deference to the tactical decisions of counsel. Deputy v. Taylor, supra. With this in mind it cannot be said that trial counsel was not attempting to pursue the best interests of his client in the manner in which the defense was presented in an attempt to present an insanity defense. However, even if this were not the case, the additional evidence, i.e., the petitioner's call to the victim's father in which he related what had transpired, the petitioner's taped confession which he made before the police were even summoned, and the fact that the murder weapon was the petitioner's and

located at the crime scene, all demonstrate that even if counsel were deficient, a different result would not have occurred.

Introduction of prior uncharged criminal conduct.

The other issue which petitioner raises in his allegation that constitutional error occurred when the court permitted the introduction of prior uncharged criminal conduct without proper cautionary instructions. Specifically, it would appear that the petitioner is challenging the admission of prior matters which occurred between him and the victim, and alleges that these matters were inadmissible. Evidentiary errors do not provide a basis for relief unless they amount to a deprivation of fundamental fairness. Reynolds v. Ellingsworth, 843 F.2d 712 (3d Cir.), cert. denied 109 S.Ct. 403 (1988). No such claim can be made here, and according this contention likewise is

meritless.

Conclusion.

Because the petitioner's allegations are without merit, it is recommended that the petition of Robert E. Thomas for a writ of habeas corpus be dismissed, and that a certificate of probable cause be denied.

Within ten (10) days after being served with a copy, any party may serve and file written objections to the report and recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate right.

Respectfully submitted,

Robert C. Mitchell, Chief
United States Magistrate
Judge

Dated: October 18, 1994

AP5-207 May 18, 1995

UNITED STATES COURT OF APPEAL FOR THE THIRD CIRCUIT

C.A. No. 94-3716

ROBERT EDWARD THOMAS

VS.

COMMONWEALTH OF PENNSYLVANIA

(W.D. Pa. Civ. No. 94-cv-00916)

Present: BECKER, HUTCHINSON, AND ALITO, CIRCUIT JUDGES

Submitted are:

(1) Appellant's request for a certificate of probable cause and memorandum in support pursuant to Rule 22(b), Federal Rules of Appellate Procedure and LAR 22.1; and

(2) Appellee's letter, dated January 9, 1995, stating its opposition to the granting of a certificate of probable cause.

in the above captioned case.

Respectfully submitted:

Clerk

PDS/CAM/ms

O R D E R

Appellant's request for a certificate of probable cause to appeal is denied because Appellant does not make a substantial

showing of the denial of a federal right. See Barefoot v. Estelle, 463 U.S. 880, reh. denied, 464 U.S. 864 (1983).

By the Court,

_____
Circuit Judge

Dated: Jul 31, 1995